EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANK KUSTINA,
Appellant,

v.

THE CITY OF SEATTLE,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Frank Kustina
5201 Ballard Ave N.W.
Seattle, Wa 98107
206-789-2155
Appellant Pro se

QUESTIONS PRESENTED

1. Did the lower federal courts in 1980 and 1983 err in applying the defense claim of res judicata to appellant's federal complaint filed in 1980?

2. Did the lower federal courts err in continuing to maintain in 1986 and 1987 that the doctrine of res judicata precluded further litigation attacking the validity of a state court judgment of dismissal in spite of demonstration from a recently obtained city memorandum showing that the underlying state judgments were the result of appellee's fraud upon those courts in obtaining judgment in which case res judicata does not apply, and the judgment is subject to direct attack?

3. Did the lower federal courts err in refusing to consider appellant's

direct attack on the validity of the underlying state judgment?

4. Given the existence of the recently obtained memorandum should F.R.C.P. rule 11 sanctions be applied to appellee City of Seattle?

5. Did the absence of notice and hearing required by local ordinance deprive appellant of the place and opportunity to exercise his right to speak to protect his real property guaranteed by the First, Fifth and Fourteenth Amendments to the United States Constitution, and thereby provide a basis for federal claims invoking jurisdiction under 42 U.S.C. sec. 1983?

6. Were the state courts so misled by appellee's presentational scheme before and to them as to deny standing and timeliness to plaintiff-appellant on unsupportable grounds that plaintiff's

action was based on seeking a writ of certiorari or pursuant solely to Seattle Ordinance 105462 appeal procedures involving an applicant instead of to redress in a court damage stemming from the defendants' misconduct regarding the houses which deprived plaintiff of his constitutional rights including but not limited to the right to speak at a hearing, and to seek a further remedy in accordance with RCW 7.48.020 which legislatively grants standing to "any person(emphasis added) whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance"?

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Appellee.

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OPINIONS BELOW

The opinions of the King County Washington Superior Court, the Washington Court of Appeals, United States District Court for Western Washington Orders dated August 11, 1980 and April 25, 1986, and Ninth Circuit Court Orders dated December 14, 1983 and January 14, 1987 are reproduced in the Appendix.

JURISDICTION

The statutory basis for federal jurisdiction of this civil case in the District Court is 28 U.S.C. 1343(1)(3)(4) and 42 U.S.C. 1983. This petition is being docketed in this Court within 90 days from the Ninth Circuit Order dated January 14, 1987. That Order specifically states "No petition for rehearing will be entertained" so perfection of any such attempt was thought futile. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Const.:

> Congress shall make no law . .abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment, United States Const.:

> No person shall . . . be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Const.:

Sec. 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

42 U.S.C. sec. 1983. Civil Action For Deprivation of Rights :

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

16 U.S.C. sec. 470. The purpose and declaration of policy of the National Historic Preservation Act is reproduced in the appendix.

Seattle Ordinance 105462 creating the Ballard Avenue Landmark District is reproduced in the appendix.

STATEMENT OF THE CASE

The matter in dispute centers around issuance of a certificate of approval and a building permit for the siting and relocation of two wooden houses into the Ballard Avenue Landmark District in Seattle, Washington. Seattle Ordinance 105462 creating the district in sec. 5 sets out the uniform procedure for issuance of each certificate of approval.

Appellant filed suit on August 23, 1977 in King County, Washington Superior Court to abate as a nuisance the structures sited and remodeled in the landmark district pursuant to a procedure spelled out by Washington State statutes. At a summary judgment proceeding the case was dismissed. The Washington State Court of Appeals affirmed the dismissal. The Washington State Supreme Court denied appellant's petition for review.

In 1980 appellant filed a federal suit. The district court held that the doctrine of res judicata precluded certain claims. In 1983 the Ninth Circuit Court of Appeals affirmed the district court's holding. In 1984 this Court denied certiorari.

Appellant came away from the Ninth Circuit oral hearing and decision in 1983 with that courts impression that the matters presented in his 1980 federal complaint were solely complex state claims. If as appellant will demonstrate federal claims were before the Ninth Circuit in 1983 then that panel's action constituted abstention which deprived appellant of federal fact determination by the federal district court.

Left at that time with no other alternative appellant returned to the state courts to recall the state mandate.

Such attempt was accompanied by an explanation that the interim time(4 or 5 years)had been used to bring federal suit and seek review, but in spite of such explanation the state courts ruled that under state rules such delay was unreasonable in seeking to recall the state mandate, and refused to allow appellant to proceed to present his contentions at an oral hearing. That sequence is analogous to what the federal rules were designed to avoid--being in the wrong court and then getting shut out of the other court.

In 1985 appellant presented a petition titled "Plaintiff's Petition to Enjoin Enforcement", but the Clerk of the Washington Supreme Court refused to file it saying that under the rules of the Washington Supreme Court there was no provision for consideration of such

petition. Appellant came away with the impression that the Washington Supreme Court did not read or consider that petition since the Clerk refused to file it so as to bring about a halt to further processing of that petition to the Washington Supreme Court.

In January 1986 appellant filed his second federal suit naming appellee as defendant. That suit is based in part on demonstrating that the appellee perpetrated fraud on the court in obtaining state judgments upon which federal courts have applied res judicata. Both the federal district and appeals court refused to consider appellant's demonstration of fraud by appellee in obtaining the underlying state judgments used and applied in federal court as a res judicata defense.

The remaining claims of the 1986

federal complaint were dismissed with prejudice. Appellant questions whether those claims should have been dismissed without prejudice rather than with prejudice. Appellant maintains that those claims or the opportunity to amend then state or will state valid federal or pendent claims based on the record. But appellant simply does not have the resources of time and money to adequatedly present them in this writ. Appellant does not feel under the facts presented such failure should be considered or construed as his waiver of such right or privilege.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT.

A. APPELLEE'S ABUSE OF POWER, MANIPULATIVE ATTEMPT TO AVOID AND ELIMINATE THE HEARING MECHANISM AND CONSTITUTIONAL PROTECTIONS PROVIDED AND REQUIRED BY AND FOR THE LEGITIMATE OPERATION OF THE LOCAL HISTORIC PRESERVATION LAW CONSTITUTES AN INCURSION THAT UNDERMINES THE EXPOSITION AND ENFORCEMENT OF HISTORIC PRESERVATION LAWS AND OTHER GOVERNMENT CLEARANCE LAWS ADDRESSED BY THIS COURT IN PENN. CENTRAL TRANSP. CO. v. N.Y.C., 98 S CT 2646(1978).

In Penn. Central this Court summarized, rationalized, and legitimized the operation of the law there by among other things pointing out a provision whereby the Commission there makes its determination "after giving all interested parties an opportunity to be heard" at the designation stage. The constitutional question here involves, in terms of the Penn Central analysis, the

opportunity to be heard at the hearing stage for a certificate of approval--called "appropriateness" in Penn. Central. The existence of such hearing is required to guarantee and exercise the First Amendment right to speak. For that reason a hearing is required by sec. 5(b) of the local ordinance prior to any district board action on each and every application for a certificate of approval for exterior building alteration.

In bringing state and federal lawsuits appellant has at all times maintained that notice and hearing prior to action taken on the application in question never occurred. There was no hearing process to legitimize the purported governmental clearance (certificate issuance) from infringing on appellant's constitutional rights.

Notice and hearing are the guaranteed point of entry for public input and participation in carrying out the public policy of historic preservation.

The state court's misstatement of fact regarding a hearing is without any fair or substantial support. In addition, as will be discussed in "II B" below that is because fraud was perpetrated upon the courts by the appellee in obtaining state judgment and res judicata in federal courts.

B. RES JUDICATA PRECLUSION IS INAPPLICABLE BECAUSE THIS IS A CASE WHERE APPELLANT HAS BEEN COMPELLED TO ACCEPT A STATE COURT'S DETERMINATION OF ISSUES ESSENTIAL TO THE RESOLUTION OF FEDERAL QUESTIONS.

Federal courts are not bound by state court determinations of what the United States Constitution requires. In the name of comity and res judicata the lower courts have surrendered the "onus

of authoritatively interpreting our federal Constitution" when compliance with that document's meaning must be found regarding procedural safeguards required by the Fifth Amendment's due process clause and the First Amendment's right to speak clause, see, e.g., Hanna v. Plumer, 380 US 460(1965).

Viewed in terms of F.R.C.P.(Title 28 USC) rule 56(c) there was unfairness and inadequacy in state procedures which culminated in state court summary judgment dismissal. The rule of confrontation recognized by federal courts to protect the integrity of Rule 56c required a state court trial of the genuine issues presented.

The underlying state court summary dismissal was clearly erroneous under Rule 56c because the appellee City as moving party failed to sustain its

burden of showing initially the absence of a genuine issue concerning any material fact. The record clearly shows a dispute over the existence or non-existence of facts regarding notice and the hearing required by the district ordinance, whether a necessity existed or was a cover up of the alleged misconduct, whether an abuse of power occurred, whether secretcy was permissible, and whether the motivation of the City in acting upon and issuing the certificate was self-serving as alleged.

Appellant had no choice but to initially turn to a state court in 1977 to protect his federal constitutional rights because at that time a city was not prior to this Court's decision in Monell v. Dept of Soc'l Svcs of NYC, 98 US 2018(1978), considered a "person" in a federal court suit for constitutional

deprivation under 42 USC sec. 1983--a congressionally created remedy.

Direct appeal to this Court within the time limit for appeal from the state court judgments was effectively foreclosed because appellant had embarked on his duty to mitigate the damage caused by appellee's misconduct. That mitigation effort required 16-hour days of strenuous physical and mental labor in preparation for remodeling appellant's real property. Upon initial completion of the contractual and financial obligations appellant was forced to undertake to mitigate the damage to his constitutional rights caused by appellee's misconduct and in furtherance of the National Historic Preservation Act(16 USC 470) appellant relying on the access provided by the Monell decision granting federal jurisdiction over the appellee

City for 42 USC 1983 purposes filed his first federal suit. Appellant by his first federal suit sought to make use of 42 USC 1983 enacted by Congress and ruled on by this Court in Monell for federal court jurisdiction of his constitutional claims.

In England v. Louisiana Bd of Med'l Examiners, 375 U.S. 411(1964) this Court makes a relevant point pertainent to the impropriety of dismissal of appellant's first federal suit. The Court observed that limited federal review of the state court adjudication, consisting of direct review in the Supreme Court by way of certiorari or appeal,

> is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would

> deny him the benefit of making fact findings. How the facts are found will often dictate the decision of federal claims.
>
> "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.", Townsend v. Sain, 372 U.S. 293,312 (1963).
>
> The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts, England v. La. Bd of Med'l Examiners, 375 U.S. at 416-17(1964).

As will be described below in "II" the fraudulent scheme by which appellee obtained state court summary judgment dismissal so misled the state court to mischaracterize and attribute to appellant an admission contrary to his state court position. The City also successfully urged that ratification, making appellant's state claims moot, was required as a matter of law in spite of a city memorandum(copy attached in

Appendix as IIC)showing that a hearing necessary for ordinance compliance and for the city to gain summary judgment had not occurred as appellant maintained.

The state courts so passed over appellant's constitutional rights and protections sought to be vindicated as to make their recognition a myth rather than a reality. Examination by a federal court of that action was required and is an unavoidable consequence of our dual court system to determine whether the state court procedure and process was fair regarding appellant's claim of deprivation of his federal constitutional rights.

C. THE LOWER FEDERAL COURTS REFUSAL TO CONSIDER APPELLANT'S DIRECT ATTACK SHOWING THAT THE UNDERLYING STATE JUDGMENTS WERE THE RESULT OF APPELLEE'S FRAUD UPON THOSE COURTS IN OBTAINING JUDGMENT ALLOWED TO BE USED AND APPLIED AS A DEFENSE IN FEDERAL COURT SO FAR DEPARTED FROM THE

ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS RECOGNIZED BY THIS COURT IN HAZEL-ATLAS v. HARTFORD CO. AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The specific showing demonstrating appellee's fraud in obtaining the underlying state judgments will be dealt with in "II B" below which as required by the Hazel-Atlas decision shows how appellee misled the courts to mischaracterize facts leading to their decision.

II. THE DECISION BELOW IS BASED UPON SEVERAL SERIOUS MISSTATEMENTS OF FACT AND THEREFORE CONSTITUTES A MISCARRIAGE OF JUSTICE.

A. THE WASHINGTON STATE COURT OF APPEALS CHARACTERIZED APPELLANT AS BEING "AGAINST THE BALLARD AVENUE LANDMARK DISTRICT" FOR SEEKING TO USE A COURT TO BRING ABOUT COMPLIANCE WITH THE STATUTORY PROCESS FOR THE UNIFORM PROCESSING OF EACH APPLICATION FOR A CERTIFICATE OF APPROVAL IN THE HISTORIC DISTRICT.

Appellant brought suit to have the appellee abide and act in accordance with the local ordinance. Compliance with the uniform processing requirements is not

against the district, but rather is in furtherance of the local ordinance and the National Historic Preservation Act (16 USC 470) policy which the local ordinance seeks to implement.

B. THE WASHINGTON STATE COURT OF APPEALS ATTRIBUTED TO APPELLANT THE FACT THAT HE ADMITTED THAT HE ATTENDED A PUBLIC HEARING ON SUCH PROPOSAL ON JULY 27, 1976 WHICH WAS NOT TRUE AND CONTRARY TO HIS PLEADINGS AND STATED POSITION.

Appellant alleged and maintained that the July 27th gathering was not a hearing. A recently obtained City memorandum dated August 5, 1976 supports appellant's position that the requisite mandated hearing was never held. Not only did appellant know that no notice or hearing occurred as required by the district ordinance, but the City's own record as evidenced by the August 5th memo(Appendix itemIIC)describes the July 27th gathering as "in essence a

community meeting" as distinguished from a "hearing". The difference between a meeting and hearing discussed there goes to the heart of the issues sought to be adjudicated at trial.

Thus, while the City was urging and insisting before Washington state courts that ratification was required as a matter of law and that the claims were moot, the City's own record shows a fundamental discrepancy as regards the omission of a "hearing". The City by its legal presentation misled the state courts to infer and mischaracterize the July 27th community meeting as a hearing.

Viewed in terms of Unioil v. E.F. Hutton, 802 F2d 1080 (9th Cir. 1986), how could reasonable inquiry in the preparation and presentation before a court avoid knowledge of or the contents of the August 5th memo showing that

no hearing occurred? Even though Unioil speaks to a Rule 11 amendment in 1983 providing sanctions, a basic absence of candor by the City or its counsel can not here be excused before that date or since 1983 under Rule 11 in presentation before state and federal courts including this Court in its October 1983 term regarding an earlier petition for certiorari that year by appellant. Rule 11 sanction against appellee may be required here.

Given the existence of the August 5th memo how can it be said the City did not omit facts critical to the application of the rule of law involving ratification and mootness relied on in obtaining the state judgment and res judicata recognition of that judgment in federal court.

If in the Unioil case the Alioto

firm has to be held to the standard as a specialist in complex business litigation then the City must here be held to a similar standard as to the occurrence of a simple hearing irregardless of its competency. The City misled the court about the facts and the law as part of a scheme to cover up its misconduct.

The August 5th memorandum was presented to the federal courts below in 1986 and 1987. Those courts refused to consider appellant's direct attack that the underlying state court judgment was the result of fraud on the court perpetrated by appellee as shown in part by the contents of that memorandum. A serious misstatement of fact is presented in the opening paragraph at page 2 in the 1987 Ninth Circuit Court of Appeals' decision before this Court which incorporates the reasoning in paragraph

2 at page 2 of the district court's ORDER. The claim based on the contents of the August 5th memo has never before been made to any state or federal court. Since the existence and knowledge of the contents of that memorandum was only recently learned by appellant, the showing made to the lower federal courts had never been made to any Washington state or federal court. The correctness or incorrectness of the state courts' failure to consider appellant's contentions, which included the Washington Supreme Court's refusal in May 1985 to even file "Plaintiff's Petition to Enjoin Enforcement of Judgment", should not foreclose the recourse here sought to demonstrate that the state judgment was obtained by appellee's fraud on the court. Since the Washington Supreme Court has refused to

file a previous petition submitted to it by appellant it is thought futile to seek the relief here sought before it since it is appellant's understanding from the previous experience just described that no procedure rightly or not exists in the Washington Supreme Court rules for presentation of appellant's contentions.

Appellant resorted to the equitable jurisdiction of a federal court to present his contention that the state judgment was obtained by appellee's fraud on the court based on this Court's decision in Hazel-Atlas and a paragraph in U.S. v. Fallbrook P.U.D., 193 F Supp 342, 361(1961) which reads:

> A proceeding for equitable relief concerning a judgment is treated as a direct, as distinguished from a collateral attack, and therefore the doctrine of res judicata does not apply,(citation omitted). Further, there is

> no requirement that such a proceeding be tried in the court which originally rendered the judgment, (citation omitted), and a Federal court has jurisdiction to grant such equitable relief from State court judgments, McNeil v. McNeil, 9 Cir., 1897, 78 F. 834, affirmed 9 Cir., 170 F. 289.

Thus, recourse to federal court relying on this Court's decision in Hazel-Atlas v. Hartford, 322 US 238, 244 (1944), was attempted, but the federal courts below refuse to consider and rule upon appellant's showing demonstrating fraud upon the courts.

In fairness to the courts below they may not grasp the fact that appellant only recently learned of the facts giving rise to the showing of fraud sought to be made. But the Memorandum and Order states that "No petition for rehearing will be entertained" so appellant's only recourse is to this Court to clarify any material fact or

law overlooked in the decision, see, e.g., CA 9-086(5/7/82) regarding FRAP 40.

Another specific instance showing fraud perpetrated on the courts is provided by appellee City's fabricating a situation for the Department Director to secretly decide upon and issue the certificate of approval on June 3, 1976 and then misstated where the power to act was to rest and how processing of the application for the certificate was required to occur. The City urged that the Director possessed authority to unilaterally act upon the application. Such presentation was totally at odds with the processing authority and procedural requirements required by the legislative history incorporated into the text of the district ordinance which removed any such notion of authority in a city hall official and uniformly

placed it solely with the district board in the first instance.

Enactment of the district ordinance was reached only after agreement that local board control and not city hall usurpation as here occurred would exist or undue influence by the City as here also occurred would occur. The City failed to accept that reality and embarked on a vindicative self-serving scheme to gain control of the district's design review mechanism for approving the applicant's ill-conceived plan to site and remodel the houses in the district irregardless of compliance with the purpose of the district and the procedures and mechanism required by the local ordinance for carrying out that purpose.

The legal deficiency that appellee can not overcome is discussed at page 33

of appellant's brief to the Ninth Circuit. That deficiency is that "A hearing was required by Seattle Ordinance 105462 sec. 5(b) prior to the purported September 14, 1976 board endorsement". That hearing as a reality did not occur. How that requirement was mischaracterized or skipped over in granting ratification is due solely to the fraud on the courts perpetrated by appellee.

Part and parcel to that plan to mislead the courts was the City's state counterclaim that appellant's state claims were frivolous and that he knew his claims were false and constituted a willful and malicious abuse of process. In the absence of notice and a hearing that counterclaim was baseless and portrayed appellant to the court as abusing the legal process he rightfully sought to invoke to vindicate his

federal constitutional rights. Once raised the City never pursued or proved that depiction of appellant.

What has transpired does not measure up to the standard recently expressed by a prominent American across the street from this Court in which he said:

> . . .Our revolution is the first to say the people are the masters and government is their servant.
>
> Don't ever forget that. Someday, you could be in this room, but wherever you are, America is depending on you to reach your highest and be your best, because here, in America, we the people are in charge.

Recollection of that speech presents a relevant reminder of the ordeal appellant has had to confront in seeking to try his claims. What would happen if someone watching on television or in the gallery and seeing the members of this Court seated in their robes from saying this Court was present and in session that evening. That absurdity is

exactly what has transpired as regards appellant's claims. Appellant was no more at a hearing on July 27, 1976 as was this Court sitting in session the evening of January 27, 1987 because of the Court's mere ceremonial presence(courtesy) that evening in a room in which a presentation was made. Just as this Court was not called into session and convened to constitute a tribunal so too on July 27, 1976 appellant's presence that evening can not be construed as being at a public hearing in the historic district which did not take place because the formality required for convening the board or holding a hearing did not occur.

Relying on this Court's decision in Hazel-Atlas resort to any rule of finality such as res judicata is outweighed by the countervailing public interest in

"preservation of the integrity of the judicial process" from enforcing a judgment obtained by fraud upon the court. Initial enforcement and continuing federal court recognition of the underlying state judgment constitutes an unconscionable injustice.

III. THE DECISION BELOW INVOLVES IMPORTANT PRINCIPLES OF CONSTITUTIONAL LAW HAVING EXTRAORDINARY PUBLIC SIGNIFICANCE.

The First Amendment is predictated on recognition and preservation of forums such as the existence of the required hearing here to allow all views to be presented and considered prior to board action. The board or any governmental body can not make a reasoned decision without access to and presentation of any and all relevant information effecting an application before it. Have we reached the point where only

those in agreement with governmental action will be provided the mandated forum and allowed to speak or participate?

A hearing means a formal hearing at which notice is given and testimony taken and not simply a community meeting at which comments are exchanged as a courtesy. The mischaracterization of a community meeting as a hearing left uncorrected or unrecognized will have a sobering effect and quell community meetings under threat that any such comment in the interest of participation might later as here occurred be manipulated and be held by a court against a person as an admission so as to constitute the opportunity for testimony and to have presented expert witnesses in support of such testimony at an imagined hearing that never took place.

IV. THE JUDICIAL CONDUCT BY WHICH THE ORAL HEARING BEFORE THE NINTH CIRCUIT WAS SUDDENLY AND HASTILY TERMINATED LEFT THE APPEARANCE THAT SUCH HEARING WAS A MERE FORMALITY RATHER THAN SERVING AS THE FORUM ESTABLISHED BY COURT RULES TO CLARIFY THE ISSUES PRESENTED.

Appellant feels it necessary to call to this Court's attention judicial conduct whereby oral hearing before the Ninth Circuit panel was suddenly brought to an end. What occurred regarding the order of argument may be correct according to the letter of the appellate rules, but the spirit of hearing both sides and providing appellant the opportunity to make a separate opening and concluding argument did not fairly occur. Appellant made an opening argument that is believed to have lasted a little more than 7 minutes of his alloted 15 minutes. Not wanting to use up the alloted time appellant made it clear to the court that he wanted to

make a closing argument and that he would reserve the remainder of his time until after opposing counsel made his presentation. Appellant may have in the excitement of the moment misspoke to say for rebuttal or after rebuttal. Irregardless of his misuse of the word "rebuttal" or not, it was clear to him from the demeanor of the court that in sitting down to allow appellee's counsel to speak that he(appellant) would upon such presentation be allowed to rebut appellee's argument and make the closing argument he had specifically reserved.

A tragedy not initially cleared up in 1976 has step-by-step taken on new dimensions and acquired serious defects as recognition of the absence of the hearing required by the local ordinance for ordinance compliance has sought to be established and recognized in state

and federal courts.

The whole episode in trying to obtain a hearing from the time of appellant's drafting and signing a petition to the Department Director requesting that the board be convened in accordance with the local ordinance to receive input regarding the application to the conduct of the Ninth Circuit oral hearing is proof of appellant's often expressed belief that a little problem left unresolved takes on a life of its own and may suddenly become a big serious problem.

Counsel for appellee rose to make his oral presentation with text or notes in his hand and Judge Beezer said, "You're not going to speak, are you?", to counsel for appellee. Counsel appeared startled and said, "No". Appellant then rose to attempt to speak and make

his closing presentation and was told that he could not speak because there was nothing to rebut. The court was hastily adjourned. Appellant fearing contempt from the tone and utterance of Judge Beezer said nothing as the court walked from the room before appellant could gather his thoughts.

Appellant may be wrong as to what he said and compliance with the letter of the rules regarding oral argument may have occurred, but appellant feels Judge Beezer over-stepped his bounds in the conduct of disallowing or suggesting presentation non occur under appellate rules, see, e.g., FRAP Rule 34 and Rule 47.

In a telephone conversation with appellee's counsel appellant asked him about his recollection of what happened at the oral hearing. Appellant asked

him if he intended to speak at the oral hearing and he said, "Yes". He went on to say, "When a court suggests you not speak you don't". Counsel for appellee further said, "While he had seen appeals panels never ask a question he had never seen an instance(as occurred) in which time requested to be reserved for a closing statement was not provided.

The foregoing was difficult for appellant to relate and charge because appellant does not have a prosecutorial disposition or mentality and he is not out to get or speak wrongly against anyone. But appellant would not be consistent in urging compliance with the hearing formality in 1976 if in 1987 he did not also concern himself with the fairness of the oral argument process before the Ninth Circuit panel.

Appellant may be wrong and Judge

Beezer may have acted correctly according to the letter of the rules, but to appellant, opposing counsel, and the sole person in the audience area Judge Beezer's conduct in hastily ending argument was unusual and strange. Appellant feels that conduct was trickery.

Based on the tone of the Memorandum and Order it may well be likely that full use of argument time and presentation might not have changed the result. There is no way of knowing. On the other hand, there is the possibility that clarification might have resolved the outcome differently and have avoided or made unnecessary this petition for certiorari--a time consuming and costly exercise.

Two other things might have effected judicial conduct. First, appellant can not help but feel that Judge Beezer may

have just been angered because the Wash-
ington State appeals decision in question
was signed by Judge Farris now on the
Ninth Circuit. Appellant had to call
to Judge Farris' clerks' attention that
perhaps Judge Farris who was assigned to
the panel first assigned to hear
argument might under rules of judicial
conduct not be able to sit. Judge Farris
recused himself and was replaced by
Judge Koelsch.

It is only speculation on appellant's
part but something behind the scenes may
have been involved and festered itself
in Judge Beezer's usual conduct at the
close of the oral hearing .

Second, it must be kept in mind that
appellant was acting pro se and Judge
Beezer may have just wanted to put
appellant in his place for not having a
member of the bar present his case or

persuading him not to appeal. That notion corresponds to the decision which comes across to appellant as stating he should not have been taking up the court's time. That notion is reinforced by the ruling that "No petition for rehearing will be entertained".

Appellant remains puzzled as to the hasty cut-off of oral presentation and the sudden adjournment.

CONCLUSION

The reason for appending a Bill of Rights to the Constitution was to prevent government from taking certain kinds of action which occurred here. This is less a case about the mechanical application of certain subsequent events to reach a rule of finality as it is the protection of basic constitutional principles. Included among that protection is the

right to fair access to initially present, establish, and proceed at trial to present a case against abuse of power by government officials. As the foregoing demonstrates appellee City engaged in fraud upon the courts in obtaining and having appellate courts sanction judgment by which appellant was stripped of precious rights guaranteed by amendments one, five, and fourteen that forbid government from the tyranny which occurred.

Any efficiency behind a rule of finality must give way to mechanisms, including the fair use of a court, that would counteract the temptation of the municipal government here to over-reach and intrude on and strip the appellant of the opportunity to exercise his right of speech at a board hearing so as to thereby protect his real property

located within the historic district from which he derived his livelihood. His efforts and the right to speak were in furtherance of those amendments and the National Historic Preservation Act(16 USC 470).

The idea of government resulting in our Constitution and the procedures for implementing it through laws such as the local district ordinance here was the result of the fundamental notion and consequence that it set up a government by open debate in the form of discussion and argument. The mechanism for such initially never occurred in the absence of the required hearing in accordance with sec. 5(b) of the local ordinance prior to action taken by the board on the application in question.

The courts below have been oblivious to the legal consideration upon which the

local historic ordinance is based. The consideration incorporated into the text of the local ordinance for the agreement to legislatively transfer development rights held by district real property owners such as appellant regarding exterior building alterations to the citizen design review concept involving the district board is premised on the reality that a hearing is required and must take place upon receipt of an application before any further board action. Such mechanism and procedure is required of all applications to allow input and participation before the board as appellant here sought by signing a petition. The reality of the notion of a hearing did not occur. As appellant has maintained, without notice and hearing the forum for the "contest" of public debate and participation required by the

First and Fifth Amendments to the United States Constitution here applicable through the Fourteenth Amendment did not exist.

Never is a court as the forum sought by resort to the courts below more necessary to be in place and properly function under our system than as here when tyranny of government by certain government officials results in denial of recognition and protection of individual rights. Such is the very purpose and reason we have a judiciary branch of government.

In addition to imagining that a hearing took place when in reality as the showing of fraud upon the court demonstrates, the state courts fell hook, line, and sinker for the City's presentation that the houses were "good" for the district. Such under this Court's

standard in Berman v. Parker, 348 US 26 (1954) is not the proper function of a court. Here a court does not determine what is good or bad. That is for a hearing before the district board. Instead of fraudulently urging and presenting the facade of full ordinance compliance before the state courts appellee should have required the applicant to submit the building's facade to the hearing mechanism.

Finally, the impediments caused by appellee's deprivation of appellant's constitutional rights and time in seeking judicial determination of his claims have taken there toll. Appellant had his right to speak taken away from him contrary to constitutional guarantees. His real property sought to be protected and preserved by his speaking has been foreclosed and he has thus lost the sole

source of his livelihood derived from that property. Appellant had to borrow money to reproduce the required copies of this petition and to pay the filing fee with the Clerk. It should also be kept in mind that there is a connection between appellee's alleged misconduct and appellant's inability to pay for legal representation. Unlike appellee, appellant can not levy and collect taxes and does not have a floor of lawyers to represent him as does appellee. Appellant's time and money have for a decade been expended and exhausted in seeking to correct a public and legal disgrace.

What has been allowed to occur is not the way to honor the Constitution.

For the foregoing reasons, Frank Kustina hereby respectfully prays that his petition for Writ of Certiorari be granted.

Respectfully submitted,

Frank Kustina

DATED:
2/3/87

Frank Kustina
5201 Ballard Ave NW
Seattle, Wa 98107
206-789-2155